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January 7, 2005

VIA ELECTRONIC MAIL AND REGULAR MAIL

Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Room TW-A325
Washington, D.C. 20554

Re: TON Services Inc. (Filer ID 819402)
CC Docket No. 96-45
Appeal of Universal Service Administrative Company's *Administrator's Decision on Contributor Appeal*, Nov. 8, 2004

Dear Ms. Dortch:

TON Services, Inc. ("TON") hereby appeals the Universal Service Administrative Company's ("USAC's" or "Administrator's") decision of November 8, 2004 ("*Administrator's Decision*," attached as Exhibit 1)[1/] denying TON's request for a credit for its overpayment of more than $400,000 in universal service fees.

I.

BACKGROUND

In June of 2004, TON sought informal guidance from USAC regarding a potential USF overpayment claim. As TON's counsel explained in a meeting with USAC (and in a follow-up

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1/ Universal Service Administrative Company, *Administrator's Decision on Contributor Appeal*, Nov. 8, 2004 ("*Administrator's Decision*").

letter dated June 24, 2004 (attached as Exhibit 2)), during the years 2000, 2001, 2002 and 2003, TON paid over $400,000 in universal service fees through its underlying carriers, MCI, Global Crossing and Touch America. TON provided USF exemption certificates to MCI and Global Crossing in September 2001 and July 2002, respectively. Despite having done so, TON did not itself file Forms 499-A or 499-Q and did not make direct federal universal service payments during the years 2001, 2002 and 2003. TON's current management team discovered this situation in late 2003, only a few months after taking the reins of the company. Promptly upon learning of the problem, TON management began the process of bringing the company fully into compliance with the universal service requirements, including by disclosing the matter to USAC and seeking USAC's guidance on how best to correct the problem. While that process was underway, the Commission's Enforcement Bureau sent a Letter of Inquiry ("LOI") to TON seeking information regarding TON's payment of universal service fees. In order to facilitate the speedy resolution of the Enforcement Bureau's investigation,[2/] and to demonstrate the company's commitment to compliance with universal service requirements, TON filed Forms 499-A for each of the years it had initially failed to do so. TON also paid all of the universal service amounts that USAC had invoiced as being due and owing, based on the Forms 499-A that TON had filed. These amounts totaled more than $1.5 million. Because USAC's invoices did not take account of TON's past universal services payments through MCI, Global Crossing and Touch America, TON paid the invoiced amounts without prejudice to a subsequent claim for

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[2/] TON later entered into a Consent Decree that resolved the Bureau's investigation. As part of the Consent Decree, TON made a payment of $400,000 to the United States Treasury and agreed to certain compliance measures. There is no linkage between the $400,000 payment to the U.S. Treasury and the roughly $400,000 USF overpayment for which TON seeks a refund; the similarity in the amounts is purely coincidence.

a credit or refund. In fact, TON promptly began discussions with USAC regarding the possibility of bringing just such a claim.

In or about August 2004, USAC informed TON that it could not provide the requested informal guidance and that TON should instead consult with Commission staff. TON sought a meeting with the Commission staff but was advised that TON would have to invoke the formal claim and appeal process in order to receive any guidance from the Commission. TON then requested that USAC treat TON's June 24, 2004 letter as a formal claim for a *credit* (not a refund) of the overpaid amounts against future universal service payments. In a letter dated November 8, 2004 captioned "*Administrator's Decision on Contributor Appeal*," USAC denied TON's claim on two distinct grounds.[3/] First, USAC found that it could not "*conclusively establish*" whether MCI, Global Crossing and Touch America had remitted to USAC the universal service payments that TON had made to those carriers, and therefore could not grant TON's claim.[4/] Second, USAC found that even had it been able to "*determine conclusively*" that MCI, Global Crossing and Touch America remitted to USAC the monies paid by TON, USAC itself "lack[s] authority" to grant a credit under these circumstances.[5/] The Administrator said that the question of "[w]hether TON can establish double payment and, if so, whether such double payments should be refunded to TON are questions appropriately directed to the [Commission]."[6/]

In this appeal, TON asks the Commission to reverse the Administrator's November 8, 2004 decision and to remand this matter to USAC with instructions (1) to evaluate TON's claim

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3/ *Administrator's Decision* at 2.

4/ *Id.* (emphasis added)

5/ *Id.* (emphasis added)

6/ *Id.*

under a preponderance of the evidence standard (rather than the "conclusive" proof standard erroneously applied by the Administrator) and (2) to provide a credit to TON for any double payments determined to have been made under that preponderance of the evidence standard of proof. At this point in time, TON does *not* ask the Commission to make any findings regarding whether TON overpaid certain amounts and is therefore entitled to a credit, as these questions should be determined in the first instance by USAC under the proper standard of proof.

II.

FORUM

The *Administrator's Decision* said it was treating TON's June 24, 2004 letter as "a formal request by TON, in accordance with 47 C.F.R. § 54.719(b), for review (Appeal) of USAC's decision" not to grant TON's request for a credit, and directed TON to file any appeal of the decision with the Commission.[7/] Aside from the fact that USAC had not previously denied any such request (as TON had not formally submitted any such request), the Administrator's instruction appears to conflict with the Commission's rules, which provide for an appeal directly to the Commission only with respect to actions "taken by a division of the Administrator,[8/] a Committee of the Board of the Administrator . . . , or the Board of Directors."[9/] Because the *Administrator's Decision* was an action of the Administrator itself,[10/] not of a division of USAC,

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7/ *Id.* at 1-2.

8/ Note that when referring to a division of the Administrator, the rule cross-references section 54.701(g), which does not exist. Presumably, this is a typographical error and the cross-reference is intended to be to section 54.701(c), which sets out the three divisions of the Administrator — Schools and Libraries, Rural Health Care, and High Cost and Low Income — none of which is applicable here.

9/ 47 C.F.R. § 54.719(c).

10/ The caption reads, "*Administrator's Decision*" and the signature reads, "Sincerely USAC." *Administrator's Decision* at 1-2. If USAC inadvertently designated the *Administrator's*

a Committee of the Board, or the Board, the rule governing appeals to the Commission does not appear to apply. The applicable rule instead is 54.719(b), which provides that a party wishing to appeal an action taken by the Administrator with respect to a "billing, collection, or disbursement matter that falls outside of the jurisdiction of the Committees of the Board" may appeal to the USAC Board of Directors.[11/] Because of the conflict between the Administrator's instruction and the Commission's rules, TON is dual filing this appeal with both the Commission and the Board in order to preserve its rights. TON nevertheless respectfully requests that the *Commission* proceed to decide the substantive issues presented in this appeal lest TON be required to pursue a futile appeal to the Board, thereby further delaying the resolution of its claim.[12/] In order to facilitate the expeditious resolution of this claim, the Commission should set forth the governing legal standards now, and then should remand this matter to USAC with instructions to follow those standards.[13/] Moreover, the Commission should review TON's arguments *de novo*.[14/]

Decision a decision of the Administrator when in fact it was a decision of the Board, USAC should redesignate the decision accordingly. *Administrator's Decision* at 2 (stating that USAC "affirm[s] USAC's decision").

11/ 47 C.F.R. § 54.719(c).

12/ Should the Commission decline to consider this appeal at this time, TON respectfully requests that the Board construe all references to requests for relief from the Commission as requests for relief from the Board.

13/ Because of the conflicting instructions on the proper forum for appeal, the rule that a party generally may not appeal to the Commission and the Board simultaneously should not apply. *See* 47 C.F.R. § 54.720(d); Order, *Request for Review of the Decisions of the Universal Service Administrator by Guamani School Guayama, Puerto Rico Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6 (Nov. 12, 2004); Order, *Request for Waiver by Waterville Public Schools Waterville, Maine Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6 (Apr. 12, 2004).

14/ 47 C.F.R. § 54.723.

III.

ARGUMENT

A. USAC Erred In Concluding That It Lacks the Authority to Grant the Relief TON Seeks.

The Administrator erroneously concluded that it "lack[s] authority to provide the requested relief."[15/] The relief TON requests simply is a credit for the more than $400,000 in universal service fees that it has overpaid. The Commission's rules explicitly grant USAC the authority to "refund any overpayments made by [a] contributor" to the universal service support mechanisms after the contributor has complied with its reporting requirements.[16/] If USAC is authorized to grant a refund, it surely must be authorized to grant a credit. And as USAC itself states in its quarterly contribution base reports, the Commission *requires* USAC to provide refunds to those who have overpaid their universal service contributions.[17/]

15/ *Administrator's Decision* at 2. USAC also erred in not seeking guidance from the Commission on TON's request in accordance with 47 C.F.R. § 54.702(c). The *Administrator's Decision* cites the first part of Rule 54.702(c), which bars USAC from making policy and from interpreting unclear provisions of the statute or rules. USAC, however, overlooks the second part of the rule, which requires the Administrator to seek guidance from the Commission "[w]here the Act or the Commission's rules are unclear, or do not address a particular situation." 47 C.F.R. § 54.702(c). Thus, USAC itself should have sought guidance from the Commission regarding any policy issues or ambiguity in the rules, rather than simply lobbing the matter back to TON with instructions to take the matter to the Commission. *See Administrator's Decision* at 2.

16/ 47 C.F.R. § 54.713. *See also, e.g.*, Order and Second Order on Reconsideration, *Federal-State Joint Board on Universal Service*, 18 FCC Rcd 4818 ¶ 14 (2003).

17/ *E.g.*, Universal Service Administrative Company, *Federal Universal Service Support Mechanisms Quarterly Contribution Base for the First Quarter 2005* at 3 (June 1, 2004), available at http://www.universalservice.org/overview/filings/2005/Q1/1Q2005%20Contribution%20Base%20FCC%20Filing.pdf (last visited Dec. 23, 2004) ("As *mandated* by the Commission, if the combined quarterly revenues reported by a carrier . . . are greater than those reported on its annual revenue report . . . , then a refund *will be provided* to the carrier.") (emphases added); Universal Service Administrative Company, *Federal Universal Service Support Mechanisms Quarterly Contribution Base for the Fourth Quarter 2004* at 3 (Sept. 1, 2004), available at

The scenario contemplated by the Commission's rules is precisely the situation here: Although TON initially failed to file Forms 499, it has now fulfilled all of its reporting obligations by filing Forms 499-A for each of the years in question. Moreover, TON remitted to USAC all amounts invoiced by USAC with respect to each of those years, notwithstanding that TON had already paid more than $400,000 of the invoiced amounts. USAC has not complained of any ongoing failure by TON to comply with the Commission's universal service rules. Under the Commission's rules and orders, USAC is plainly authorized to credit or refund any overpayment to TON.[18/]

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http://www.universalservice.org/overview/filings/2004/Q4/4Q2004 Contribution Base FCC Filing.doc (last visited Dec. 23, 2004) (same); *see also* Order and Second Order on Reconsideration, *Federal-State Joint Board on Universal Service*, 18 FCC Rcd 4818 ¶ 14 ("As necessary, USAC refunds or collects from contributors any over-payments or under-payments. If the combined quarterly revenues reported by a contributor are greater than those reported on its annual revenue report . . . , then a refund is provided to the contributor based on an average of the two lowest contribution factors for the year. If the combined quarterly revenues reported by a contributor are less than those reported on its FCC Form 499-A, USAC collects the difference from the contributor using an average of the two highest contribution factors for the year."); Report and Order and Order on Reconsideration, *Federal-State Joint Board on Universal Service; Petition for Reconsideration Filed by AT&T*, 16 FCC Rcd 5748 ¶ 12 (2001) (same) ("*Contribution Methodology Order*").

[18/] In 1999, the Commission reconsidered an earlier conclusion and determined that all telecommunications carriers that provided supported services to eligible rural health care providers at a discount under section 254(h)(1)(A) of the Act should receive a credit against their universal service obligations and further were eligible for reimbursements if their total universal service credits exceeded their contribution obligations. Fourteenth Order on Reconsideration, *Federal-State Joint Board on Universal Service*, 14 FCC Rcd 20106 ¶ 1 (1999) ("*Fourteenth Order on Reconsideration*"). Previously, only eligible telecommunications carriers ("ETCs") had been eligible for such a credit. *Id.* at ¶ 1. The Commission stated: "we believe that it would contravene the language and intent of the statute to prohibit some non-ETC carriers from receiving full credit for their participation. Refunds in such instances serve effectively as simply a return of overpayment of a carrier's universal service obligation . . . ." *Id.* at ¶ 21; *see also, e.g.*, Order, *Federal-State Joint Board on Universal Service*, 13 FCC Rcd 5243 ¶ 10 (1998) (waiving 47 U.S.C. § 54.515 to the extent necessary to allow carriers seeking reimbursement from USAC for the provision of services to a school or a library to choose to apply the amount of a discount afforded to that school or library either as a credit to their contribution obligation or as a direct reimbursement from USAC). A credit in this case likewise would serve simply as a return of overpayment of TON's universal service obligations.

USAC's authority to grant a credit or refund in this situation is confirmed by reference to other sources of federal law. In the analogous tax context, for example, it has long been held that the IRS is *required* to provide a credit or refund to a taxpayer who has overpaid his or her taxes. Section 4602 of the Internal Revenue Code provides that in cases of overpayment, the IRS may credit the amount of such overpayment to any tax liability and then "shall" refund the balance to the taxpayer.[19/] Indeed, tax cases routinely refer to the government's "obligation" to refund a taxpayer's overpayment.[20/]

Sound policy also counsels against USAC's position. In setting out its universal service contribution methodology, the Commission emphasized that the procedure for refunding overpayments and collecting underpayments "will provide an incentive for carriers to accurately report their quarterly revenues."[21/] USAC's practice of effectively refusing to provide credits or

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19/ 26 U.S.C. § 6402(a); *see also, e.g., Your Ins. Needs Agency, Inc. v. United States*, 2000 U.S. Dist. LEXIS 13653, at *11 (D. Tex., 2000) ("Under 26 U.S.C. § 6402(a), the United States is obligated to refund a taxpayer's overpayments").

20/ *E.g., Your Ins. Needs Agency*, 2000 U.S. Dist. LEXIS 13653, at *12 (finding the government's "obligation to refund Plaintiffs' overpayments . . . was fulfilled" where the government issued refund checks to Plaintiffs and sent them to the address on Plaintiffs' returns); *In re Bourne*, 262 B.R. 745, 749 (Bankr. E.D. Tenn. 2001) (stating at which point the "IRS's obligation to the debtor to refund her overpayment of income taxes" arose); *Dixon v. United States ex rel. IRS (In re Dixon)*, 209 B.R. 535, 538 (Bankr. W.D. Okla. 1997) (discussing at which point in the year the IRS's "obligation to refund an overpayment arises"); *In re Lawson*, 187 B.R. 6, 7 (Bankr. D. Id. 1995) (concluding that "the IRS's obligation to refund [an] overpayment accrued" at the end of the year); *In Re Canon*, 130 B.R. 748, 752 (Bankr. N.D. Tex. 1991) (holding IRS was "obligat[ed] to deliver the refund" of debtor's $14,900 overpayment to trustee for the debtor's bankruptcy estate even though the IRS previously had refunded the overpayment to the debtor because "[s]ubsequent distribution of the refund to the Debtor does not relieve the IRS of its obligation to surrender to the Trustee property of the estate which is in the constructive possession of the IRS."); *but c.f. In re Block*, 141 B.R. 609, 611 (N.D. Tex. 1992) (holding that once the debtor has made pre-petition election to have overpayment credited to following year's tax liability, the overpayment cannot become property of the bankruptcy estate and thus is not recoverable by trustee).

21/ Report and Order and Order on Reconsideration, *Federal-State Joint Board on Universal Service; Petition for Reconsideration filed by AT&T*, 16 FCC Rcd 5748 ¶ 12 (2001).

refunds for overpayments leads to inefficiency in the collection mechanism because it encourages carriers to pay only those amounts they are *certain* of owing. If contributors instead operated with the assurance that their overpayments would be refunded (or credited), they would have greater incentives to pay the full invoiced amounts promptly, thereby increasing the USF's efficiency and overall effectiveness.[22/]

[22/] *See, e.g., Lorusso v. United States*, 1996 U.S. Dist. LEXIS 10470, at *12 (D. Mass. 1996) (noting that Congress intended strict statutes of limitations for requesting tax refunds in order to "set in place incentives for timely -- or near timely -- filing of tax returns."); *Whitworth Bros. Storage Co. v. Cen. States, Southeast & Southwest Areas Pension Fund*, 982 F.2d 1006, 1016 (6th Cir. 1993) (citing *Kwatcher v. Mass. Serv. Employees Pension Fund*, 879 F.2d 957, 965-966 (1st Cir. 1989), *infra*, and finding that restrictions on refunds "must not be arbitrary and capricious as measured by equitable principles."); *Jamail, Inc. v. Carpenters Dist. Council of Houston Pension & Welfare Trusts*, 752 F. Supp. 741, 744 (S.D. Tex. 1990), *reversed in part*, 954 F.2d 299 (5th Cir. 1992) (citing *Soft Drink Indus. Local Union No. 744 Pension Fund v. Coca-Cola Bottling Co.*, 679 F. Supp. 743 (D. Ill. 1988), *infra*, and finding unenforceable six-month limitation on refunds of mistaken payments in employee benefit plan); *Kwatcher*, 879 F.2d at 965-966, *overruled in part on other grounds by Yates v. Hendon*, 541 U.S. 1 (2004) (describing result of giving a pension fund complete discretion to determine whether to refund erroneously disbursed funds as follows: "Since there would be no incentive to return mistaken payments voluntarily, the permissive refund mechanism . . . would be like a permanently-shut window: decorative, but of no assistance in letting in a breath of fresh air. We will not lightly assume that Congress intended to enact a self-nullificatory refund provision. We are equally loath to think that Congress meant either to craft a heads-I-win, tails-you-lose matrix, or to institutionalize a one-sided windfall permitting employee-participants to sponge off an employer's good-faith bevues. In the long run, penalizing employers for undercontributing . . . while refusing to refund their excess contributions, could frustrate ERISA's [Employee Retirement Income Security Act's] goal of expanding pension plan coverage. Manifest inequity is one effective way of discouraging employers from sponsoring ERISA-qualified plans at all."); *Soft Drink Indus. Local Union No. 744 Pension Fund*, 679 F. Supp. at 750 ("It would take more unequivocal language than that found in the refund section [of ERISA] for us to conclude that Congress intended the potentially absurd consequences which might result if employers have no hope of recovering mistaken overpayments. . . . In the absence of at least an equitable action, there will be no incentive for fund trustees to return overpayments to employers. Moreover, they will face substantial disincentives, not least of which is the exposure to lawsuits for breach of fiduciary duty."); *Gen. Motors Corp. v. United States*, 389 F. Supp. 245, 249 (E.D. Mich. 1975) ("Permitting the taxpayer to fall back upon the general provisions of [a section of the Internal Revenue Code] to recover interest on funds wrongfully collected by the government after a legitimate claim for credit has been rejected . . . . encourages timely action by both [the government and the taxpayer]").

Finally, the fact that TON made the claimed overpayment against the backdrop of a now concluded Enforcement Bureau investigation has no bearing on the authority and obligation of USAC to grant a credit or refund. TON paid the USAC invoices in full in order to remove any doubt regarding its commitment to compliance with the universal service rules, and thereby to clear the way for a prompt resolution of the investigation. The Consent Decree expressly references the fact that TON was in discussions with USAC and Commission staff regarding the refund claim. There is no linkage between the $400,000 payment that TON made to the U.S. Treasury (pursuant to the terms of the Consent Decree) and the credit that TON is seeking from USAC. Nor is there any basis for denying TON's request simply because it may have initially been delinquent in satisfying its reporting and payment obligations. As discussed above, the Commission's rules plainly envision (1) that a carrier that brings itself into compliance with the universal service rules may then proceed to seek a credit or refund for any overpayments, and (2) that USAC has the authority to grant such a request. Accordingly, the Commission should reverse USAC's erroneous conclusion that it lacks the authority to grant TON's requested relief.[23/]

B. USAC Erred in Using "Conclusive" Proof as the Standard of Review.

USAC further erred in applying so-called "conclusive" proof as the evidentiary standard governing TON's request for relief.[24/] The *Administrator's Decision* twice set out this standard: (1) ". . . USAC doubts it could ever establish *conclusively* whether an underlying carrier in fact reported and paid on a particular carrier's revenue . . . ." and (2) "Nevertheless, even were we

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[23/] In the event the Commission somehow concludes that USAC lacks the authority to grant a credit to TON, the Commission itself should hold that TON is entitled to a credit to the extent that it demonstrates the amount of its overpayment by a preponderance of the evidence.

[24/] *Administrator's Decision* at 2.

able to determine *conclusively* that TON's underlying carriers had in fact paid USF charges based upon certain revenue report [sic] by TON, ..."[25] USAC offers no support for this unprecedented and unexplained standard.

Instead of applying the unattainable evidentiary standard of conclusive proof, USAC should have used a preponderance of the evidence standard, which routinely is used in analogous proceedings. The Commission, in fact, explicitly has instructed USAC to use a "preponderance" standard in determining, during the course of an audit, whether a recipient of funds has violated the Act or the Commission's rules:

> USAC shall continue to recover funds whenever it discovers a statutory or rule violation . . . . The standard for determining such a violation is the same standard that we use in our enforcement actions: specifically, whether a party has willfully or repeatedly failed to comply with any provision of the Act or any rule, regulation, or order issued by the Commission, based on a preponderance of the evidence.[26]

Thus, USAC must use a "preponderance" standard to determine whether a violation of a statute or rule should result in a monetary recovery for USAC. USAC should use the same standard to determine whether a contributor has overpaid and thus is entitled to recover money or receive credits from USAC. The Commission uses this same "preponderance" standard in section 503 enforcement proceedings (when determining whether to impose a monetary forfeiture)[27] and in

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[25] *Administrator's Decision* at 2 (emphases added).

[26] Fifth Report and Order and Order, *Schools and Libraries Universal Service Support Mechanism*, 19 FCC Rcd 15808 ¶ 73 (2004).

[27] *E.g.*, Notice of Apparent Liability for Forfeiture, *Complaints Against Various Television Licensees Concerning Their February 1, 2004, Broadcast of the Super Bowl XXXVIII*, 19 FCC Rcd 19230 ¶ 8 (2004) ("The Commission will then issue a forfeiture if it finds, by a preponderance of the evidence, that the person has violated the Act or a Commission rule."); Notice of Apparent Liability for Forfeiture and Order, *Globcom, Inc. d/b/a Globcom Global Communications; Apparent Liability for Forfeiture*, 18 FCC Rcd 19893 ¶ 12 (2003) (same).

section 208 proceedings (when determining, among other things, whether to require the payment of money damages from one party to another).[28] In other words, in determining whether money is owed or should be paid, the Commission routinely uses a "preponderance" standard and, to our knowledge, has *never* used anything akin to the "conclusive" proof standard announced by USAC. The Commission also used a "preponderance" standard in the recently completed section 271 proceedings[29] and it uses that standard in the broadcast licensing context.[30]

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[28] *E.g.*, Order, *Marzec v. Randy Power*, 15 FCC Rcd 4475 ¶ 5 (2000); Order, Consumer.Net v. AT&T Corp., 15 FCC Rcd 281 ¶ 6 (1999).

[29] *E.g.*, Order, *Application by SBC Communications Inc., Southwestern Bell Telephone Company, And Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance; Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services In Texas*, 15 FCC Rcd 18354 ¶ 48 (2000) ("The evidentiary standards governing our review of section 271 applications are intended to balance our need for reliable evidence against our recognition that, in such a complex endeavor as a section 271 proceeding, no finder of fact can expect proof to an absolute certainty. . . . [W]e reiterate that the BOC needs only to prove each element by 'a preponderance of the evidence,' which generally means 'the greater weight of evidence, evidence which is more convincing that the evidence which is offered in opposition to it.'"); Memorandum Opinion and Order, *Application of Verizon Pennsylvania Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc., and Verizon Select Services Inc. for Authorization To Provide In-Region, InterLATA Services in Pennsylvania*, 16 FCC Rcd 17419, 17497 (2001).

[30] *E.g.*, Initial Decision of Administrative Law Judge, *Reading Broadcasting, Inc.; For Renewal of License of Station WTVE(TV), Channel 51 Reading, Pennsylvania and Adams Communications Corporation; For Construction Permit For a New Television Station to Operate on Channel 51, Reading, Pennsylvania*, 16 FCC Rcd 8309 ¶¶ 10, 22, 224, 248 (2001) (considering broadcast license renewal and construction permit applications); Decision, *Contemporary Media, Inc.; Licensee of Stations WBOW(AM), WBFX(AM), and WZZQ(FM), Terre Haute, Indiana; Order to Show Cause Why the Licenses for Stations WBOW(AM), WBFX(AM), and WZZQ(FM), Terre Haute, Indiana, Should Not be Revoked; Contemporary Broadcasting, Inc.; Licensee of Station KFMZ(FM), Columbia, Missouri, and Permittee of Station KAAM-FM, Huntsville, Missouri (unbuilt); Order to Show Cause Why the Authorizations for Stations KFMZ(FM), Columbia, Missouri, and KAAM-FM, Huntsville, Missouri, Should Not be Revoked; Lake Broadcasting, Inc.; Licensee of Station KBMX(FM), Eldon, Missouri, and Permittee of Station KFXE(FM), Cuba, Missouri; Order to Show Cause Why the Authorizations for Stations KBMX(FM), Eldon, Missouri, and KFXE(FM), Cuba, Missouri, Should Not be Revoked; Lake Broadcasting, Inc.; For a Construction Permit For a New FM Station on Channel 244A at Bourbon, Missouri*, 13 FCC Rcd 14437 ¶ 16 (1998) (reviewing revocation of broadcast licenses and construction permits and denial of application for new station).

Again, other sources of federal law confirm the error of USAC's decision. Perhaps most significant, in the tax context, a taxpayer who sues for a refund of an overpayment must prove by a preponderance of the evidence that the Internal Revenue Service's assessment of taxes was erroneous. The Internal Revenue Manual sets out this evidentiary standard for a petitioner in a tax case, and courts consistently recognize that taxpayers seeking a refund for overpayment must demonstrate such overpayment by a preponderance of the evidence.[31/]

Accordingly, the Commission should find that TON need prove its overpayment by a preponderance of the evidence, not by some undefined standard of "conclusive" proof.

IV.

CONCLUSION

For the foregoing reasons, TON respectfully requests that the Commission reverse USAC's determinations (1) that USAC lacks the authority to grant TON's request for a credit of any overpayment found to have been made; and (2) that conclusive proof is the applicable evidentiary standard governing TON's request. TON further respectfully requests that the

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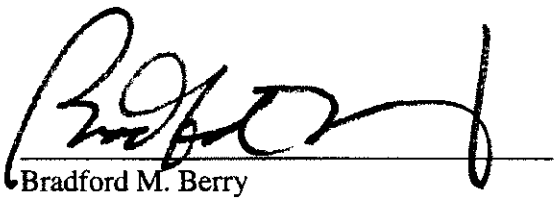
31/ *E.g.*, Internal Revenue Manual § 35.5.1.2 (last amended Apr. 6, 1989) (petitioner's burden "is a burden of persuasion; it requires petitioner to demonstrate the merits of his/her claim by at least a preponderance of the evidence."); *Apollo Fuel Oil v. United States*, 195 F.3d 74, 76 (2d Cir. 1999) ("When the IRS has assessed a penalty, its assessment is presumptively correct, and the taxpayer who sues for a refund has the burden of persuading the factfinder by a preponderance of the evidence that the assessment is not correct."); *Dains v. United States IRS*, 1998 U.S. App. LEXIS 14924, at *14-15 (6th Cir. 1998) (noting that, where an action for a refund involves a counterclaim by the IRS, "the taxpayer has the burden of showing that he was not a responsible party on both the refund claim and the counterclaim. . . . If the taxpayer proves by a preponderance of the evidence that the assessment is incorrect, the IRS must prove what the correct assessment is.") (citations and internal quotation marks omitted); *Aldrich v. United States*, 256 F. Supp. 508, 514-515 (D. La. 1966) ("In a suit for refund of taxes . . . the taxpayer has the burden of proving, by a preponderance of the evidence, that the Commissioner's determination was erroneous.") (citing, *inter alia*, *Lewis v. Reynolds*, 284 U.S. 281 (1932)); *Cohn v. United States*, 1957 U.S. Dist. LEXIS 4388, at *17 (W.D. Tenn., 1957) ("In actions to recover income taxes alleged to have been overpaid, the plaintiffs must show by a preponderance of the evidence that they have in fact overpaid their taxes, and establish the facts from which a correct determination of their liabilities can be made.") (citing *Lewis*, 284 U.S. at 283).

Commission remand this case to USAC for further consideration of TON's request in light of the Commission's ruling.

Respectfully submitted,



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Counsel for TON Services, Inc.

January 7, 2005

cc: Contributor Letter of Appeal, Universal Service Administrative Company

Attachment

Exhibit 1

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June 24, 2004

BY HAND DELIVERY

CONFIDENTIAL TREATMENT REQUESTED

Anne Marie Trew
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Re: TON Services Inc. (Filer ID 819402)

Dear Anne Marie:

As discussed at our meeting last week, TON Services Inc. ("TON") would appreciate your informal "take" on whether TON should seek a ruling from USAC or the FCC on TON's request for a credit against USAC's forthcoming invoice to reflect TON's payments of Universal Service Fund ("USF") fees to TON's underlying carriers. TON has paid $412,726.93 in USF fees to underlying carriers and, as shown on the spreadsheets attached as Appendix A, of that $412,726.93, the carriers presumptively remitted at least $404,365.65 to the USF.[1] Accordingly, TON requests a credit of no less than $404,365.65.

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[1] Based on a review of its underlying carriers' invoices, TON determined that it had been billed by its underlying carriers for a total of $412,726.93 in USF fees. To determine what part of that amount would have been remitted by the carriers to the USF, TON, for each month, multiplied the applicable monthly USF contribution factor against the invoice total (less taxes) to obtain the monthly amount the carriers would have owed to the USF based on their revenues from billing TON. Those monthly amounts total $404,365.65. Attached as Appendix B are sample pages from TON's underlying carrier invoices showing the line item assessing the USF fee, the total amount of the invoice and the amount paid by TON on the preceding month's invoice. TON will be glad to submit whatever additional documentation is required as support for the requested credit. Please note that the MCI invoice is addressed to Flying J Inc., TON's parent. Flying J has multiple accounts with MCI, including some on behalf of TON. TON only seeks herein a credit for the MCI account for TON's debit/prepaid calling card platform.

We know that we spent some time with you last week telling you of TON's efforts to bring itself into compliance with the universal service requirements. We will not repeat that discussion here, but for your convenience we are enclosing as Appendix C a redacted copy of the letter we filed last week with the Enforcement Bureau. (The redacted portion contained TON's responses to the Bureau's requests for information.) The unredacted part of the letter lays out the relevant background of the steps TON has taken to come into compliance with its USF obligations.

Section 54.706(b) of the Commission's Rules requires that TON "shall contribute to the federal universal service support mechanisms on the basis of its interstate and international end user telecommunications revenues." 47 C.F.R. § 54.706(b). TON is prepared to contribute fully to the USF on the basis of its applicable Form 499 revenues,[2] but absent a credit for the payments, TON's actual contributions to the USF will exceed the contributions required by Section 54.706(b). Such a result would be unfair to TON and would represent a windfall to the USF.

During our discussions last week, you expressed concern that TON's underlying carriers may have failed to pass on to the USF the fees paid by TON to the carriers. We believe this is clearly not the case with regard to two of the carriers: MCI and Global Crossing, which account for $353,447.70 and $25,316.46 respectively, of the $404,365.65 credit that TON seeks. Each of those carriers are involved in ongoing bankruptcy proceedings. In each proceeding, the carrier obtained authorization of the bankruptcy court to pay in full its respective pre-petition obligations to the USF.[3] Presumably those carriers paid their respective pre-petition USF obligations, and then continued to pay their respective post-petition USF contributions in the ordinary course of business pursuant to Section 363(c)(1) of Title 11 of the United States Code.

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[2] TON could not have properly – and did not – reduce the revenues reported on its Form 499 filings to reflect the amounts it was invoiced by and paid to its underlying carriers.

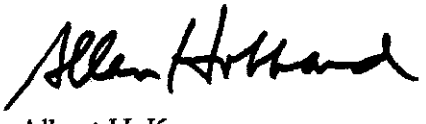
[3] *See* Final Order (i) Authorizing the Debtors to Pay Prepetition Sales and Use Taxes and Regulatory Fees and (ii) Directing Financial Institutions to Honor and Process Checks and Transfers Related to Prepetition Sales and Use Taxes and Regulatory Fees dated August 16, 2002, entered in the bankruptcy case *In re Worldcom et al.*, Case No. 02-13533 (Bankr. S.D.N.Y.); Order (i) Authorizing the Debtors to Pay Prepetition Sales and Use Taxes and Regulatory Fees and (ii) Directing Financial Institutions to Honor and Process Checks and Transfers Related to Prepetition Sales and Use Taxes and Regulatory Fees dated January 28, 2002, entered in the bankruptcy case *In re Global Crossing et al.*, Case No. 02-40188 (Bankr. S.D. N.Y.).

With respect to TON's third underlying carrier – Touch America, which accounts for $25,601.49 of the credit TON seeks – TON believes the USF fees TON paid Touch America likely were remitted to the USF. TON's last invoice from Touch America was in February 2002, and Touch America, which is in bankruptcy, did not file its petition for relief under Chapter 11 until June 2003. TON is aware that USAC has asserted a pre-petition, general unsecured claim against Touch America, and that USAC has initiated or intends to initiate an audit of Touch America. Absent a finding to the contrary in that audit, Touch America would have reported, been billed by and paid to USAC by year-end 2002 USF contributions for all revenue Touch America had billed TON through February 2002.

The suggestion also was raised that TON seek relief from its underlying carriers. As we explained, that is not a viable option. The carriers have already remitted to the USF the fees that TON paid them and thus no longer have the fees to return to TON.

We look forward to your response.

Sincerely,



Albert H. Kramer
Allan C. Hubbard

Enclosures

Copy to (w/ encls.):
Jeffrey Mitchell, USAC
Jagjit Singh, TON
Ian Williams, TON
Brett Sanford, TON

APPENDIX A

CONFIDENTIAL TREATMENT REQUESTED

TON Services Inc.
USF Payments Made to Carriers
2000 - 2004

Calendar Year	USF Paid	USF Calculated	Difference
2000	142,641.65	144,576.01	(1,934.36)
2001	180,123.48	172,761.37	7,362.11
2002	61,264.01	56,758.05	4,505.96
2003	28,696.66	30,269.00	(1,572.34)
2004	1.13	1.23	(0.10)
	412,726.93	404,365.65	8,361.28

CONFIDENTIAL TREATMENT REQUESTED

TON Services Inc.
USF Payments Made to Carriers
2000

Calendar Year	Qtr	Month	Invoice Date	Carrier	Invoice Total	Taxes	Invoice Pre-Tax	USF	%	Rate	Note	Calc USF	Diff
2000	3	Jul	8/10/2000	MCI	153,118.37	5,659.58	147,458.79	8,197.63	5.56%	5.5360%		8,163.32	34.31
2000	3	Aug	9/10/2000	MCI	191,484.54	7,338.71	184,145.83	9,935.55	5.40%	5.5360%		10,194.31	(258.76)
2000	3	Aug	8/25/2000	MCI	344,496.63	13,972.63	330,524.00	17,667.24	5.35%	5.5360%		18,297.81	(630.57)
2000	3	Sept	10/10/2000	MCI	198,603.50	7,811.83	190,791.67	10,320.25	5.41%	5.5360%		10,562.23	(241.98)
2000	3	Sept	9/25/2000	MCI	336,863.70	13,800.24	323,063.46	17,180.88	5.32%	5.5360%		17,884.79	(703.91)
2000	4	Oct	11/10/2000	MCI	192,250.95	7,825.88	184,425.07	10,344.14	5.61%	5.6688%		10,454.69	(110.55)
2000	4	Oct	10/25/2000	MCI	345,785.45	17,501.46	328,283.99	17,522.63	5.34%	5.6688%		18,609.76	(1,087.13)
2000	4	Nov	12/10/2000	MCI	142,029.41	5,205.48	136,823.93	7,240.50	5.29%	5.6688%		7,756.27	(515.77)
2000	4	Nov	11/25/2000	MCI	322,233.72	16,262.38	305,971.34	16,382.18	5.35%	5.6688%		17,344.90	(962.72)
2000	4	Dec	1/10/2001	MCI	127,839.69	3,781.91	124,057.78	10,077.26	8.12%	5.6688%		7,032.59	3,044.67
2000	4	Dec	12/25/2000	MCI	303,461.65	15,214.44	288,247.21	15,570.20	5.40%	5.6688%		16,340.16	(769.96)
2000	4	Dec	1/3/2001	Touch Am	35,477.09	1,339.76	34,137.33	2,203.19	6.45%	5.6688%	A	1,935.18	268.01
								142,641.65				144,576.01	(1,934.36)

A> Invoice does not split out USF and TRS but reflects them together as one number

TON Services Inc.
USF Payments Made to Carriers
2001

Calendar Year	Qtr	Month	Invoice Date	Carrier	Invoice Total	Taxes	Invoice Pre-Tax	USF	%	Rate	Note	Calc USF	Diff
2001	1	Jan	2/10/2001	MCI	152,183.66	6,891.92	145,291.74	18,681.68	12.86%	6.6827%		9,709.41	8,972.27
2001	1	Jan	1/25/2001	MCI	238,320.10	13,050.89	225,269.21	15,921.47	7.07%	6.6827%		15,054.07	867.40
2001	1	Jan & Feb	2/28/2001	Touch Am	54,428.36	2,403.26	52,025.10	4,572.02	8.79%	6.6827%	A	3,476.68	1,095.34
2001	1	Feb	3/10/2001	MCI	121,356.03	5,536.01	115,820.02	7,560.94	6.53%	6.6827%		7,739.90	(178.96)
2001	1	Feb	2/25/2001	MCI	182,641.00	8,621.50	174,019.50	11,552.88	6.64%	6.6827%		11,629.20	(76.32)
2001	1	Mar	3/31/2001	Touch Am	34,392.80	1,295.77	33,097.03	2,464.55	7.45%	6.6827%	A	2,211.78	252.77
2001	1	Mar	4/10/2001	MCI	128,376.48	5,860.31	122,516.17	7,994.31	6.53%	6.6827%		8,187.39	(193.08)
2001	1	Mar	3/25/2001	MCI	151,521.96	7,172.92	144,349.04	9,560.05	6.62%	6.6827%		9,646.41	(86.36)
2001	2	Apr	4/30/2001	Touch Am	32,985.22	1,242.71	31,742.51	2,383.58	7.45%	6.8823%	A	2,184.61	178.97
2001	2	Apr	5/10/2001	MCI	120,343.90	5,499.22	114,844.68	7,464.88	6.50%	6.8823%		7,903.96	(439.08)
2001	2	Apr	4/25/2001	MCI	162,897.18	7,747.76	155,149.42	10,254.87	6.61%	6.8823%		10,677.85	(422.98)
2001	2	May	5/31/2001	Touch Am	35,838.80	1,349.95	34,488.85	2,568.72	7.45%	6.8823%	A	2,373.63	195.09
2001	2	May	6/10/2001	MCI	105,535.80	5,032.17	100,503.63	6,508.64	6.48%	6.8823%		6,916.96	(408.32)
2001	2	May	5/25/2001	MCI	136,940.58	6,581.71	130,358.87	8,529.68	6.54%	6.8823%		8,971.69	(442.01)
2001	2	Jun	6/30/2001	Touch Am	41,316.99	1,718.60	39,598.39	2,639.73	6.67%	6.8823%	A	2,725.28	(85.55)
2001	2	Jun	7/10/2001	MCI	99,904.17	4,752.33	95,151.84	6,256.77	6.58%	6.8823%		6,548.64	(291.87)
2001	2	Jun	6/25/2001	MCI	138,751.13	6,894.88	131,856.25	8,674.63	6.58%	6.8823%		9,074.74	(400.11)
2001	3	Jul	7/31/2001	Touch Am	37,906.30	1,431.60	36,474.70	2,712.48	7.44%	6.8941%	A	2,514.60	197.88
2001	3	Jul	8/10/2001	MCI	98,907.36	4,694.76	94,212.60	6,248.00	6.63%	6.8941%		6,495.11	(247.11)
2001	3	Jul	7/25/2001	MCI	130,483.91	6,510.81	123,973.10	8,135.85	6.56%	6.8941%		8,546.83	(410.98)
2001	3	Aug	8/31/2001	Touch Am	24,172.51	914.80	23,257.71	1,725.96	7.42%	6.8941%	A	1,603.41	122.55
2001	3	Aug	9/10/2001	MCI	104,962.40	5,016.20	99,946.20	6,595.50	6.60%	6.8941%		6,890.39	(294.89)
2001	3	Aug	8/25/2001	MCI	130,326.17	6,475.80	123,850.37	8,065.80	6.51%	6.8941%		8,538.37	(472.57)
2001	3	Sept	9/30/2001	Touch Am	19,976.64	756.96	19,219.68	1,424.52	7.41%	6.8941%	A	1,325.02	99.50
2001	3	Sept	10/10/2001	MCI	89,156.33	4,538.99	84,617.34	-	0.00%	6.8941%		-	-
2001	3	Sept	9/25/2001	MCI	126,866.09	6,369.83	120,496.26	7,891.68	6.55%	6.8941%		8,307.13	(415.45)
2001	4	Oct	10/31/2001	Touch Am	18,058.23	684.38	17,373.85	1,286.64	7.41%	6.9187%	A	1,202.04	84.60
2001	4	Oct	11/10/2001	MCI	94,660.93	4,526.03	90,134.90	-	0.00%	6.9187%		-	-
2001	4	Oct	10/25/2001	MCI	111,004.38	5,939.66	105,064.72	-	0.00%	6.9187%		-	-
2001	4	Nov	11/30/2001	Touch Am	17,663.13	669.53	16,993.60	1,258.23	7.40%	6.9187%	A	1,175.74	82.49
2001	4	Nov	12/10/2001	MCI	87,856.27	4,197.08	83,659.19		0.00%	6.9187%		-	-
2001	4	Nov	11/25/2001	MCI	119,817.31	6,392.23	113,425.08		0.00%	6.9187%		-	-
2001	4	Dec	12/31/2001	Touch Am	16,984.14	644.00	16,340.14	1,209.42	7.40%	6.9187%	A	1,130.53	78.89
2001	4	Dec	1/10/2002	MCI	87,354.93	4,189.51	83,165.42		0.00%	6.9187%		-	-
2001	4	Dec	12/25/2001	MCI	113,471.99	8,353.81	105,118.18		0.00%	6.9187%		-	-
								180,123.48				172,761.37	7,362.11

A> Invoice does not split out USF and TRS but reflects them together as one number